No. 11661

IN THE

# United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

---

HOME INDEMNITY COMPANY OF NEW YORK, a corporation,

*Appellant,*

*vs.*

STANDARD ACCIDENT INSURANCE COMPANY OF DETROIT, a corporation, *et al.*,

*Appellees.*

---

## PETITION FOR REHEARING.

---

JONES, THOMPSON & KELLY,
1017 Rowan Building, Los Angeles 13,
*Attorneys for Appellee Standard Accident Insurance Company of Detroit, a Corporation.*



Parker & Company, Law Printers, Los Angeles. Phone TR. 5206.

## TOPICAL INDEX

## TABLE OF AUTHORITIES CITED

### Cases



### Statute

No. 11661

IN THE

# United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

---

HOME INDEMNITY COMPANY OF NEW YORK, a corporation,

*Appellant,*

*vs.*

STANDARD ACCIDENT INSURANCE COMPANY OF DETROIT, a corporation, *et al.*,

*Appellees.*

---

## PETITION FOR REHEARING.

---

*To the United States Circuit Court of Appeals for the Ninth Circuit and to the Judges Thereof:*

Comes now appellee, Standard Accident Insurance Company of Detroit, a corporation, and presents this, its petition for a rehearing of the above entitled cause, and, in the event such rehearing be denied, for a clarification of the opinion heretofore filed, and in support thereof respectfully shows:

I.

## It Is Respectfully Submitted That a Rehearing Should Be Granted as This Court's Opinion Does Not Expressly Dispose of This Appellee's Theory of the Case and Contention Made at Oral Argument in Regard to the Effect on Appellee's Policy of a Breach by White of Appellant's Policy.

The statement in the first paragraph of the opinion is that Standard's complaint prayed for judgment declaring, ". . . that it had no liability to pay any judgment that might be rendered therein *until the appellant had fully paid and discharged its liability* under a certain policy of automobile liability insurance issued by it." (Emphasis supplied.)

A further statement, on page 3, is that

> "Accordingly, Standard is endeavoring to fix the appellant's liability as the primary insurer, so that Standard itself *may become* only the excess insurer, under the provision in Standard's policy relative to 'excess insurance over any other valid and collectible insurance available to the insured.'" (Emphasis supplied.)

This leaves serious doubt in our minds as to whether or not the court overlooked the paragraph of the prayer to the effect that if it be determined that White breached the conditions of appellant's policy and thereby released appellant from its obligations to him then it be adjudged that this appellee is not obligated to defend the state court actions but "that its sole obligation under said policy is to pay such portion of such judgment or judgments which may be rendered against said George White in said actions as shall be in excess of the insurance that would

have been available to said George White had he not breached the terms and conditions of said policy of insurance issued by defendant Home Indemnity Company of New York as in this complaint alleged, and which excess is not in excess of the limits of liability as set forth in the policy of insurance issued by this plaintiff." [Prayer of Complaint, par. 5, Tr. pp. 15-16.]

Irrespective of the express condition of this appellee's policy as to cooperation, White impliedly covenanted to act in good faith and not to do anything which would prejudice this appellee and deprive it of its rights under its contract, and that he therefore could not, by failing to perform the conditions of the Home's policy on his part to be performed and thereby releasing it, change the obligation of Standard from that of insurer of only that part of his liability to the appellees Fitzgerald, Lee, *et al.*, as was in excess of $100,000 as to each, to an insurer of the *first dollar* of that liability.

That White did covenant to use good faith and not to so act as to deprive Standard of the fruits of its contract (its right to be an excess insurer only) is clearly established.

See:

*Universal Sales Corp. v. Cal. etc., Mfg. Co.*, 20 Cal. (2d) 751, 771, 128 P. (2d) 665;

*Uproar Co. v. National Broadcasting Co.*, 81 F. (2d) 373, 377 (C. C. A. 1).

The situation here is analogous to that of a person who has made a promise, the performance of which is dependent upon the happening of an event. The promissor in such a case cannot avoid liability by himself so acting as

to prevent the event upon which his promise is contingent from occurring.

See:

*Taylor v. Simi Construction Co.,* 23 Cal. App. 308, 137 Pac. 1095.

*Carl v. Eade,* 81 Cal. App. 356, 253 Pac. 750.

The reason for this rule is that one may not take advantage of his own wrong, which is a maxim of law established by the Civil Code of California (see Sec. 3517, Civ. Code).

At the time of the occurrence of the accident Home's policy constituted primary insurance and was valid and collectible. It still remained valid and still remained collectible, until White by his own intentional wrong, that is, his wilfull failure to cooperate with the Home, had released it from liability. Certainly, if a person cannot escape liability by preventing the happening of an event upon which his promise to perform is contingent, he cannot by failure to carry out his contractual obligations under one contract, change the position of a party with whom he has another contract so as to create a liability on that party which would not, except for his wrongful acts, have existed.

There is also an analogy between the situation here and one which often arises under the law of suretyship. If the obligee under a contract of suretyship holds security from the principal and releases that security, the surety for the principal is uniformly held to be released, at least to the extent of the value of the security which the obligee gives up.

*Kiessig v. Allspaugh,* 91 Cal. 231, 232-233, 27 Pac. 655;

*Eppinger v. Kendrick,* 114 Cal. 620, 625-626, 46 Pac. 613;

*Montgomery v. Sayre,* 100 Cal. 182, 34 Pac. 646;

*Lamb v. Wahlenmaier,* 144 Cal. 91, 94-95, 77 Pac. 765.

The reason why the surety is released is because the security of the principal which he holds is the primary security for the performance of the obligation of the principal, and he cannot by releasing that make the surety liable upon his contract primarily instead of only liable after the primary security has been exhausted.

Certainly it must be admitted that at the time of the accident the policy of appellant was "valid and collectible insurance available to the insured" (White). The only breach claimed by appellant was the statements made by White *after* the accident in reporting the same to appellant and others. This court has decided that White, *after the accident,* voluntarily breached appellant's policy. Before such breach it was valid and collectible insurance available to White. The provisions of appellant's policy and the one issued by this appellee in regard to "Assistance and Cooperation of the Insured" and "Action Against Company" which are quoted in the opinion of this court, are identical, as are almost all other important provisions of the two policies.

If, in fact, there is any liability at all on the part of the Standard to pay any of the amount of the judgments entered in said state court actions, it should be held expressly that Standard is not liable unless and until the judgment in each action exceeds the sum of $100,000.00, and not left to interpretation of the opinion.

II.

**It Is Submitted That, in the Event the Court Declines to Grant a Rehearing, for the Guidance and Benefit of Counsel and Litigants in This Matter and to Prevent Further Litigation, the Opinion of This Court, Filed May 11, 1948, Should Be Expressly Amplified as to the Intended Effect on the Rights Between This Appellee and the Other Appellees.**

The opinion of this court contains the following:

"The learned District Judge found that White did not 'make any false, conflicting, misleading or inconsistent statements of fact' in reporting the accident to the appellant; that the appellant 'has not been in anywise prejudiced by any action or statement or omission' of White; and that, having assumed the defense of the state court actions, the appellant has the duty 'to attempt to establish the truth of the statement of George White, that he was asleep and did not know that the accident occurred, so long as said George White maintains that said statement is true,' etc.

The first two of these findings are inferences from undisputed testimony or documentary evidence, from which we are in as good a position to draw deductions as was the court below. The third 'finding of fact' is in reality a pure conclusion of law.

Believing that *all three of the above holdings* are 'clearly erroneous,' we are compelled to the conclusion that the *judgment based thereon* cannot stand. (Emphasis added.)

Accordingly, the judgment is reversed."

The findings referred to above are numbers 16, 17, 18 and 19 [Tr. p. 183].

This appellee believes that it was the intent of this Honorable Court from the foregoing portion of the opinion to reverse only the three "above holdings" and the "judgment based thereon" which appellee interprets as being paragraphs 1, 2, 3, 4 and 9 of the judgment, which are found at pages 189-190 of the transcript of the record.

Under the general rules governing the effect of a reversal this appellee assumes that the remaining paragraphs of the judgment are not affected by the decision as no appeal was taken by any of the appellees. However, the broad statement of this court that "Accordingly, the judgment is reversed," is open to interpretation and contention that this court decided *all* paragraphs of the judgment were reversed and rendered of no effect.

In *Tillman & Bendel v. California Packing Corp.* (C. C. A. 9), 63 F. (2d) 498, 501, the court says:

> "Since the appellee has filed no cross-appeal, and since no plain error of law is involved in the court's finding, it will not be disturbed."

In *Muskogee Nat. Tel. Co. v. Hall* (C. C. A. 8), 118 Fed. 382, 384, the court says:

> "The judgment of the United States court of appeals in the Indian Territory, insofar as it undertook to reverse the decree of the lower court and to grant an injunction in favor of the Creek Nation, was erroneous, for the reason that the nation had not appealed from the decree of the lower court, so far

as the record now before us discloses. . . . It failed to take an appeal from the decree, and the adjudication of the lower court, so far as it was concerned, accordingly became final."

See also:

*Philadelphia Casualty Co. v. Fechheimer* (C. C. A. 6), 220 Fed. 401, 418;

*Guardian Savings and Trust Co. v. Dillard* (C. C. A. 8), 15 F. (2d) 996, 998;

*Reynolds Spring Co. v. L. A. Young Industries, Inc.* (C. C. A. 6), 101 F. (2d) 257, 262.

In California, the rule has been clearly stated in *Smith v. Anglo-California Trust Co.*, 205 Cal. 496, 505, 271 Pac. 898, where the court says:

"For the guidance of the court below it is proper to state herein that the nonappealing lien claimants are not in a position to derive any benefit from the reversal in part of the judgment. (Lake v. Superior Court, 187 Cal. 116, 118-120 (200 Pac. 1041, 1042).) In the cited case it is declared that 'an appeal by only a portion of the defendants, however broad in terms the notice of appeal may be, is, in legal effect, an appeal only from a portion of the judgment affecting them, and gives jurisdiction to the appellate court to reverse or modify the judgment only in so far as it affects the interests of the appellants.' The judgment in the instant case by separate and numbered paragraphs adversely disposes of the asserted severable rights and interests of the respective lien claimants in and to the sum of money in dispute. It necessarily follows, therefore, that the respective appealing lien claimants could prosecute an appeal only from such portions of the judgment as affect them, and this despite the statement in their notice of appeal that the

appeal is 'from the whole and from each and every part of that certain judgment given and made herein. . . .'"

For the reasons above stated, it is respectfully submitted that this court should, for the guidance of all parties concerned, amplify its opinion by expressly limiting the reversal of the judgment to paragraphs 1, 2, 3, 4 and 9 thereof, which are the only ones affecting the rights of the appellant.

WHEREFORE, upon the foregoing grounds, it is respectfully urged that a rehearing be granted or, in the event the same be denied, that the court amplify its opinion in the manner suggested.

Respectfully submitted,

JONES, THOMPSON & KELLY,

By EVERETT W. THOMPSON,

*Attorneys for Appellees.*

---

## Certificate of Counsel.

I one of the counsel for the above named Standard Accident Insurance Company, do hereby certify that the foregoing Petition for Rehearing of this cause or amplification of the opinion filed therein is presented in good faith and not for delay.

EVERETT W. THOMPSON.